Case Number: 3313119.2023

EMPLOYMENT TRIBUNALS

Claimant: **Mrs P McEneaney**

Respondent: **Ministry of Defence**

Before: Employment Judge Findlay

Sitting at: Reading by CVP **On:** 12 and 13 June 2025

Representation:

Claimant: In person

Respondent: Ms A Robinson, Counsel

JUDGMENT

1.The claimant has not made a service complaint within the meaning of section 121 of the Equality Act 2010 ("EA 10") about the following matters, hence the Tribunal has no jurisdiction to consider her complaints under section 120(1) EA10 about them and they are dismissed: paragraphs 1.2 (allegation 1(d) in the draft list of issues at p74 of the bundle) and 1.4 below.

2. The other allegations listed below, save as they relate to pregnancy related illness or "direct pregnancy/maternity discrimination under section 13 of the Equality Act 2010" were included by the claimant in her service complaint about the matter, so that the Employment Tribunal has jurisdiction to deal with them.

REASONS

RELEVANT ISSUES

1. The respondent contends that the claimant has not made a service complaint about the following matters, so that the Tribunal has no jurisdiction to consider them and they must be struck out:

1.1 Paragraphs 1(c), 3(d) and 5(d) in the parties' draft list of issues starting at page 74 in the bundle, that being an allegation (now categorised alternately as direct sex discrimination or unfavourable treatment due to pregnancy or exercising the right to maternity leave or as victimisation) about Air Commodore (Air Cdre) Burns failing to recommend the claimant for additional comment on her performance by a third reporting officer (3RO), Air Vice Marshall Maria Byford, after receiving a recommendation from Group Captain Yates in December 2022 ;

1.2 Paragraph 1(d) in the draft list, being an allegation of direct sex discrimination in that Group Captain Lewis Cunningham asked the claimant on the 3rd of May 2023 whether she had reached the conclusions she had in the NSI into RAFAT (delivered on 1st of July 2022) because she is female;

1.3 Paragraph 1(e) in that list, Air Cdre Burns saying, on the 8th of August 2023, that he could "feel the emotion" when the claimant raised the negative impact on her career of the 2021 /2022 OJAR and the ongoing negative effect of the report due to her period of maternity leave. Air Cdre Burns is alleged to have expressed his disappointment and referenced the fact that the claimant was normally logical and very precise, implying that she was not presenting a rational concern. The claimant alleges that this is an allegation of direct sex discrimination, in that the comment would not have been made to a male colleague;

1.4 The allegation (added after the draft list of issues by the claimant) that Group Captain Yates said, on the 15th of May 2023, that comparing the claimant and a male colleague was like comparing apples and oranges. She alleges this was direct sex discrimination;

1.5 Allegation 3(f) in the list, that the respondent applied criteria in assessing the claimant's performance that resulted in her being treated unfavourably due to pregnancy. This is the same factual allegation as paragraph 5(g) and the claimant now agrees that it is a complaint of unfavourable treatment due to pregnancy or her exercise of her right to take maternity leave within section 18 or alternatively of direct sex discrimination. The allegations in paragraph 3 are effectively otiose, as the claimant now accepts that it is not possible to make a complaint of direct pregnancy or maternity discrimination under section 13 of the Equality Act. The criteria in question, (those which I have accepted are included in the claim) are those set out at paragraph 60 of the claimant's particulars of claim, that is, those referred to by Air Cdre Burns on the 8th of August 2023: clear leadership, strong staff work, EQ, IQ and PQ "to name but a few" and the fact that the claimant needed to be more competitive than her peers. The claimant accepted that having "assured politics" would not in itself disadvantage a pregnant woman or one who was exercising or had exercised etc her right to maternity leave;

1.6 That the respondents subjected the claimant to indirect sex discrimination under paragraph 8 a(ii) of the draft list, again by appraising the claimant against the criteria/metrics referred to by Air Cdre Burns as alleged in paragraph 60 of the particulars of claim -that is clear leadership, strong staff work, EQ IQ and PQ "to name but a few" and the fact that the claimant needed to be more competitive than her peers.

RELEVANT FACTS

2. I have already decided that the points listed above are included in the claimant's particulars of claim, which she lodged on the 10th of November 2023. Prior to that, the claimant had submitted a service complaint form on the 10th of August 2023, which is at page 192 in the bundle. The covering e-mail is to be found at page 203-4 and states that the claimant was in the process of trying to resolve her complaints informally but could not conclude this until Air Cdre Burns returned from leave. The claimant confirms that Air Cdre Burns is the subject of the complaint and that Group Captain Yates and Wing Commander McLean are witnesses. The claimant asserts that there is a conflict of interest and therefore that the RAF Service Complaints team should not deal with her complaint.
3. The allegation about Air Cdre Burns failing to recommend the claimant for additional comment on her performance by a third reporting officer (3RO), Air Vice Marshall Maria Byford, after receiving a recommendation from Group Captain Yates in December 2022, is not included in the initial service complaint form. At page 264, paragraph 97 in the amended record of interview (ROI), the claimant says that she became aware that Group Captain Yates had proposed to her for a 3RO report after receiving the outcome of a subject access request (SAR); in other words, after she had made her service complaint. At paragraph 98 she states that the 3RO report would have been from Air Vice Marshall Maria Byford and that there is no record of any discussions about this or why Air Cdre Burns did not accept the recommendation.
4. The allegation of direct sex discrimination to the effect that Group Captain Lewis Cunningham asked the claimant on the 3rd of May 2023 whether she had reached the conclusions she had in the non-statutory investigation (NSI) delivered on 1st of July 2022 into RAFAT (the Royal Air Force Aerobatics Team, commonly known as the "Red Arrows") because she is female does not appear in the service complaint dated the 10th of August 2023 itself. This is despite the fact that the comment is alleged to have been made prior to the submission of that complaint, and the service complaint is not stated to be against Group Captain Cunningham. At paragraph 103 in the claimant's amended ROI, see page 299, the claimant does include that allegation. The comment is included in a section which starts at paragraph 101 on page 298, and it is headed "Negative impact of RAFAT NSI" - that is, in relation to the claimant's allegation that she was treated unfavourably because of a protected act, namely her role in leading and authoring that NSI.
5. The allegation that Air Cdre Burns, on the 8th of August 2023, said that he could "feel the emotion" when the claimant raised the negative impact on her career of the 2021 /2022 OJAR and the ongoing negative effect of the

report due to her period of maternity leave: Air Cdre Burns is alleged to have expressed his disappointment and referenced the fact that the claimant was normally logical and very precise, implying that she was not presenting a rational concern. Again, this does not appear in the claimant's initial service complaint but is referred to at paragraph 74 in the ROI at page 291. The claimant has added the comment that she was offended by the statement and that the implication was that Air Cdre Burns would not have made a comment like that to a male colleague in the claimant's position.

6. The allegation that Group Captain Yates said, on the 15th of May 2023, that comparing the claimant and a male colleague was like comparing apples and oranges: this does not appear in the original service complaint. It does appear at paragraph 26 of David Field's original record of the claimant's interview at page 226, but in the context that the comparison was between "legal" as opposed to "people" professions. At paragraph 28 in the original version of the ROI, the claimant raises her concerns about a change in attitude to her which she associates with her perception that the reaction to her NSI report had affected her appraisal - page 227. In the version of the ROI which was accepted, at paragraph 46, page 283, the claimant talks again about the conversation in which she says the comment was made. She states in that paragraph that Group Captain Yates had made comments which further heightened the claimant's concerns as to whether Air Cdre Burns had complied with JSP 757 (which she accepts is the correct policy in relation to OJARs) or whether she had been treated fairly.
7. At paragraph 48 on page 283, we find the reference to "apples and oranges", but the references to "legal" and "people" as the basis of the comparison are missing. These paragraphs are part of a long passage concerning the claimants discussion with Group Captain Yates on the 15th of May 2023, which, she says, resulted in her questioning whether her "2RO" – that is the appraisal by GC Yates - had been completed honestly or whether it had been impacted by her being pregnant and taking maternity leave or indeed, see paragraph 54, by the alleged controversy surrounding the NSI. At paragraph 56 on page 286, the claimant states that at that time, in May 2023, she still felt Group Captain Yates was supportive of her work and a "champion" of the NSI recommendations. At paragraph 59, she expresses her suspicion that the reason that Group Captain Yates had not told her (in October 2022) that she was ranked #4 of the cohort reporting to Air Cdre Burns was that the position had been changed, impliedly by Air Cdre burns, following the discussion with Group Captain Yates in October 2022.
8. Next, the allegation that the respondent applied criteria in assessing the claimant's performance that resulted in her being treated unfavourably due to pregnancy. In her service complaint form at page 197, the claimant says that: " on the 8th of August 2023 Air Cdre Burns provided further details about how he conducts peer group comparison ranking by explaining the metrics he used but he did not tell me how I personally scored against those metrics or where I could have improved. He simply stated that I needed to be more competitive against my peers". The claimant continues that "it was encouraging that Air Cdre Burns stated that he did not

recognise my concerns about less favourable treatment or detriment because of protected characteristics and or protected acts. He said that he viewed my lead of the NSI into unacceptable behaviours at RAFAT to be a positive in his grading of my performance. Whilst both those comments are reassuring, our discussion has yet to fully resolve my concerns as I have not been told how I scored against metrics or my numerical position".

9. At p198 in the claimant's service complaint, when explaining why she thinks that the treatment she experienced was wrong, she states that she was not properly appraised during the reporting period to enable her to be more competitive in the peer group comparison ranking and during pre-boarding for AST, and/or because her appraisal during the reporting period was impacted by pregnancy and/or maternity and/or because her role resulted in her undertaking protected acts/reduced her ability to be competitive.
10. In her amended record of interview, the claimant states that she believes that her PGC (peer group comparison) ranking was changed, and she was denied a 3RO, because of:
    10.1 Her pregnancy, either because she was appraised against metrics that placed her at a disadvantage as a pregnant service person, or because she was not honestly appraised because she was a pregnant service person and/or
    10.2 Her sex, because she was given a lower ranking as it was assumed her value to the RAF was lower than a male or would diminish or be limited due to her responsibilities as a primary carer, and/or
    10.3 her sex because the metrics broadly referred to, at first sight, would place females at a disadvantage; and/or
    10.4 a protected act.
11. The metrics referred to are set out at paragraph 71 at page 257 in the final ROI and they are the same as set out at paragraph 60 of the particulars of claim in the claim form. At page 269 paragraph 115 in the ROI, the redress sought by the claimant changed in that she was asking that the RAF set out a clear policy on a consistent method to be used for peer group comparison, to ensure assurance against unlawful discrimination. This is not present in the initial service complaint at page 199 which asks for the claimant's peer group comparison to be amended to the original position given at the end of the reporting period and prior to maternity leave, that her peer group comparison should be given us a numerical value, that the 2RO narrative to be amended to clarify that access to AST is not dependent on completion of a command tour, and assignment to an alternative command position to commence around the end of 2025. In other words, in the original service complaint form, there was no suggestion that any metrics or criteria applied by the respondent placed women in general at a disadvantage and needed to be changed.

12. Due to the potential conflict of interest, the claimant's service complaint with was dealt with by the Army Service Complaints Secretariat. I was taken to a number of emails between the claimant and Lieutenant Colonel Sue Drysdale about the scope of the claimant's complaints. Following a discussion, the Lt Colonel emailed the claimant on the 23rd of September

2023, see page 209, setting out her understanding of the complaints being made by the claimant, as follows:

" You allege you have been discriminated against on the grounds of pregnancy, and/or maternity, and/or sex, and/or a protected act under S27 Equality Act (namely authoring a report finding there had been breaches of the Equality Act), as your 2RO input into your 21/22 report was unfair and amounts to a detriment, the impact of which was a failure to pre-board for AST.

Examples are:

1. Your ranking within your peer group, and included in your OJAR, changed after you commenced maternity leave and / or after the NSI report you authored was promulgated more widely within the RAF and MOD.
2. You have not been provided with adequate explanation by your 2RO of the peer group ranking within ACOS Pers Pol AoR.
3. You have not been properly appraised of your performance by your 1RO and 2RO throughout the RP to enable you to maximise your performance and competitiveness for AST.
4. Comments in your OJAR by your 2RO regarding AST have resulted in misunderstanding by Career Management during pre-boarding for AST."

13. The Lieut. Colonel stated, in the e-mail on page 209, "these are just some examples of the unfair report and the detail will come out in the investigation. Please confirm you are content and I will issue the admissibility letter which I would like to do this week…"
14. On the 25th of September 2023, again on page 209, the claimant replied stating "I am content".
15. So, at that point, it was clear that the service complaint was about Air Cdre Burns and his input into the claimants 2021 to 2022 annual appraisal report (OJAR – Officers Joint Annual Report), which the claimant alleged was unfair and amounted to discrimination on the grounds of pregnancy, maternity and or sex, and/or detriment due to a protected act.
16. On the 5th of October 2023, on page 205, the claimant set out a basic timeline of events which she said was not exhaustive. She said that her complaint was that her peer group comparison ranking appeared to have been influenced by the protected characteristic of maternity and/or a protected act pursuant to section 27 of the EA10, namely, leading the RAFAT NSI that revealed unlawful acts under the 2010 Act.
17. On the 23rd of October 2023, the claimant was interviewed over Microsoft Teams by David Field, to whom investigation of the complaint had been delegated. This resulted in an 8-page record of interview which begins on page 221.
18. The claimant was not satisfied with the record of interview (ROI) and submitted an amended version which was ultimately accepted by Mr. Field. 2 versions of the final ROI are in the bundle, the first starts at page 238 to 269, and a version showing tracked changes starts at page 270 and runs to 304.
19. As the claimant states in paragraph 12 of her particulars of claim, prior to the 14th of June 2021, the claimant was previously the head of the RAF Service Complaints team, and she has demonstrated that she is well

aware of the process which should be followed and of the relevant case law. The claimant is a qualified solicitor.

20. The claimant asked me to take account of comments she had made in respect of disclosure given by the respondent during the course of the service complaint (in December 2023), which she said supported her argument that the points set out above where always included in her service complaint. I checked with the claimant whether any of the comments she had made in respect of the disclosure by her made new or additional points to those raised in the amended ROI and she accepted that they did not.
21. On the 11th of January 2024, the claimant received the decision body's determination of her service complaint.
22. On the 24th of January 2024, the claimant appealed against the determination of the decision body.
23. On the 5th of March 2024, the claimant's application to appeal was refused by the Army Service Complaints Secretariat.
24. On the 4th of April 2024, the claimant submitted her application for review of the decision about the admissibility of her appeal to the Service Complaints Ombudsman for the Armed Forces (SCOAF).
25. On the 30th of April 2024, the SCOAF upheld the decision of the Army Service Complaints Secretariat to refuse access to an appeal.
26. On the 12th of June 2024, the claimant made an application for a review of the service complaint based on both substance and maladministration. On the 1st of July 2024, the SCOAF informed the claimant that the service complaint would not be investigated further and that the request for a case review was denied.

RELEVANT LAW

27. Section 121 of the EA10 provides that section 120(1) of that Act does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless (a) the complainant has made a service complaint about the matter, and (b) the complaint has not been withdrawn.
28. No one has suggested that the claimant has withdrawn a service complaint in this case. The respondent contends that the claimant has not made a service complaint about various matters which are raised in her claim form to the Employment Tribunal.
29. The claimant was formerly the Head of Service Complaints for the RAF, where she was a serving officer. There has been a significant amount of case law in relation to section 121 in the recent past, with which the claimant is familiar. She produced a detailed skeleton argument for the purposes of the previous hearing in February 2025, and I confirm that I have taken account of both the arguments that she raises in her skeleton argument and all of the case law which she quotes in it.
30. The parties did not take me in detail through the Armed Forces Act or the 2015 Service Complaints Regulations, but did refer me to two recent decisions of the Employment Appeal Tribunal: firstly, a decision of Mrs Justice Stacey in the case **of MOD v Rubery, 2024 EAT P165**, and a

decision of Mrs Justice Heather Williams in the case of **Edwards v MOD, 2024 EAT p18**, where both Judges set out in detail the legal provisions relating to service complaints and when a complaint can be made to the Employment Tribunal.

31. The **Rubery** case was primarily concerned with whether the exclusion of complaints **about** the statutory service complaints process by section 121 was compliant with Article 6 and 14 of the European Convention on Human Rights. In paragraph 31 and 32 of her decision, the Judge set out a list of matters which are excluded from the service complaints procedure under regulation 3(2) of the 2015 regulations, including decisions about the admissibility of a service complaint, the outcome of the complaint, decisions about whether an appeal is being brought before the end of a specified period, decisions on appeal, alleged maladministration in connection with the service complaint or about decisions by the relevant Ombudsman (SCOAF) or the handling of the decision by SCOAF. As the Judge says, broadly speaking, complaints about the service complaint process itself are exempted by regulation 3(2) and that exclusion is absolute, with no derogation for complaints, for example, about discrimination. Mrs Justice Stacey concluded that, as the respondent had justified the exclusion of complaints about the service complaints process from the jurisdiction of the ET, see paragraph 79/80,that could not be said to be a breach of Article 6 (or indeed article 14) ECHR and the Employment Judge was not justified in reading additional words into the statute to make it compliant.
32. At paragraph 77 of her judgment, the Judge explains that how the service complaint was dealt with internally may well be considered as a possible aggravating or mitigating factor affecting the extent of the claimant's injury to feelings should she succeed. Although the tribunal would not be able to treat the matters raised about the decision-making process as a free-standing complaint upon which findings of discrimination or victimisation could be made, the tribunal has the power to make recommendations which could include recommendations about the service complaints procedure.
33. The Judge also held in paragraph 26 that reference to a service complaint in section 121(1) is a reference to a service complaint which has been accepted as valid by the prescribed officer under the service complaint procedure, but that a decision by the prescribed officer to refuse to accept what purports to be a service complaint can be challenged by judicial review (see **Molaudi**) – that is, not in the ET.
34. The **Edwards** case is more closely aligned to the current case and concerned whether or not the Employment Judge in question had properly concluded that the claimant had not raised matters of discrimination in her service complaint. As the claimant has pointed out, in the course of giving her judgment, Mrs Justice Williams quoted with approval certain aspects of the decision of Jane McNeill KC sitting as an Employment Judge in the cases of **Zulu and Gue**. Mrs Justice Williams did point out, however, that the cases of **Zulu and Gue** were distinguishable from the case before her, as in those cases the complainants had made service complaints which clearly disclosed what the Judge had referred to as a <u>general environment</u> of race discrimination or harassment (emphasis added).

35. During her judgment, Mrs Justice Williams endorsed and/or gave the following guidance:
    1. Section 121(1)(a) requires there to be a link between the matter complained of in the service complaint and the alleged acts done in the claim to the Employment Tribunal. The core question is how close the link must be to cross the jurisdictional threshold.
    2. “Matter” in section 121 means something more general than the “act” complained of or the “act done” and is broader than “the specific incident”, which was the term used in the previous legislation.
    3. “Matter” is used to refer to how a person thinks they have been wronged regarding their service in the armed forces. The service complaint is the complaint about the wrong which the claimant wishes to have redressed.
    4. The purpose of the statutory service complaint process is to give an opportunity for complaints, which may subsequently be brought to the Employment Tribunal, to be first considered by the military authorities. That means there must be sufficient detail in the service complaint to make it possible for a decision to be made about “the matter” before a claim is brought to the Employment Tribunal about the same matter. That is, the complaint must be one capable of being resolved by a decision maker before the matter proceeds to the Employment Tribunal.
    5. This does not mean that every detail of the complaint must be particularised in the service complaint form. The service complaint must be made in writing under regulation 4 of the Armed Forces (Service Complaints) Regulations 2015 SI 1955, but further clarification of a service complaint may take place in interview. There was an interview of the claimant in this case.
    6. A service complaint is not the same as a pleading; a significant degree of detail is required but the approach should not be overly legalistic. Complainants are permitted to attach documents to the service complaint and as indicated above, the process may involve an interview at which complainants may further explain how they say they have been wronged. Where a complainant has incorporated documents by reference into the service complaint which clarify or elaborate the complaint, or they clarify or elaborate in interview, Judge McNeill held that there was no reason to construe the service complaint so narrowly as to exclude those further particulars, and this was endorsed by the EAT in **Edwards.**
    7. Regulation 4(2) (c) of the 2015 regulations states that the complainant must state how they have been wronged and whether they are alleging discrimination, harassment or victimisation in respect of the restricted definition of discrimination given in regulation 4(5) – this includes sex discrimination but excludes pregnancy discrimination – i.e. they must say if they are alleging sex discrimination or sexual harassment or victimisation, but need not expressly state if they are alleging pregnancy discrimination.
    8. The complainant need not use the words discrimination, harassment or victimisation, the question is whether in substance and considered in the round, this is the nature of the allegation being made. The

complainant does not need to use Equality Act language regarding protected characteristics or protected acts and would not be expected to distinguish in the complaint between technical concepts such as direct or indirect discrimination - paragraph 92 of the EAT judgment- but it is incumbent on the claimant to identify how they have been wronged (emphasis added).

9. It is not sufficient that the service complaint contains alleged events or conduct that could give rise to an Equality Act complaint of discrimination, otherwise virtually all complaints would have that character (emphasis added)
10. The question of whether the act complained of to the Employment Tribunal was the "matter" that was the subject of the service complaint is to be approached in a non-technical way by identifying the substance of the service complaint, reasonably read and assessed as a whole -paragraph 91 of the EAT decision.

11. It is necessary for the Employment Tribunal to focus on the substance of what is being alleged in the service complaint. The balance is between the statutory aim to enable the armed forces to determine complaints internally prior to litigation and the complainant's right of access to a court or Tribunal within a reasonable time (see **Duncan v MOD EAT0191/14/RN** per Eady J). As a result, a purposive approach is required.
12. The claimant asserted that the effect of **Rubery** is that if the decision maker considers that during the process a complainant is raising new complaints which were not part of the matter raised in the service complaint, it is incumbent upon the internal decision maker to refer this as a separate complaint under the service complaints procedure. The claimant says that Stacey J dealt with this in the case of Rubery, but having reread that decision I cannot see any reference to such a point and the claimant did not tell me which paragraph she was referring to. In any case, regulation 8 of the 2015 Armed Forces (Service Complaints) regulations provides that if the claimant raises an additional matter by way of complaint at any time after the specified officer has made a decision on admissibility of the service complaint, that matter must be made the subject of and dealt with as a fresh service complaint.
13. Regulation 8 is not dealt with in **Rubery** at all. In any case, it seems to me that even if the decision maker is obliged to indicate to the complainant that they consider that the complainant is making a fresh complaint at a later stage in the service complaint process, as that is part of the service complaints process itself, if the decision maker fails to do so it cannot be a matter over which the ET has jurisdiction – see **Rubery.** It may be that a complainant would have some alternative remedy, but that is not a matter for me to decide.
14. Regulation 4(2) (b) of the 2015 regulations provides that the statement of complaint must also provide the name, where known, of any person who is alleged by the complainant to be the subject of the complaint or implicated in any way in the matter, or matters, complained about.

Application of Law to Facts

15. On the 23rd of September 2023 at 15.48, at p209, Lt Col Drysdale wrote to the claimant as set out above, asking her to confirm that she was content with the Heads of Complaint that the Lt Col. had identified from the claimant's service complaint. She said: "you allege that you have been discriminated against on the grounds of pregnancy and or maternity and or sex and or a protected act under section 27 Equality Act (namely authoring a report finding there had been breaches of the Equality Act, as your 2RO input into your 21/22 report was unfair and amounts to a detriment, the impact of which was a failure to pre board for AST.

Examples are:

1. Your ranking within your peer group, and included in your OJAR, changed after you commenced maternity leave and/or after the NSI report you authored was promulgated more widely within the RAF and MOD.
2. You have not been provided with adequate explanation by your 2RO of the peer group ranking within ACOS Pers Pol AoR.
3. You have not been properly appraised of your performance by your 1RO and 2RO throughout the RP [reporting period] to enable you to maximise your performance and competitiveness for AST.
4. Comments in your OJAR by your 2RO regarding AST have resulted in misunderstanding by Career Management during pre-boarding for AST.

16. On the 25th of September 2023 at 14.54, the claimant replied "Susan I am content."
17. The claimant says that the reason she agreed to these heads of complaint was because Lieutenant Colonel Drysdale had said, as indicated above, that "these are just some examples of the unfair report and the detail will come out in the investigation".
18. In my view, however, it should have been clear to the claimant that what the Lieutenant Colonel was saying was that she had identified the main points that the claimant was raising as complaints about her appraisal and peer group ranking by Air Cdre Burns for the reporting period 2021 to 2022, which the claimant was alleging had the continuing consequence of failing to make her a competitive candidate for the AST. The claimant believed that participating in the AST course was her route to advancement.
19. The Lieutenant Colonel was saying that the detail of why the claimant believed that she had been unfairly treated and discriminated against in relation to the OJAR - officers joint annual reports- for that period - would come out during the investigation. She was not suggesting that it would be alright for the claimant to add other complaints, unconnected to her 2021 to 2022 appraisal and peer group comparison ranking by Air Cdre Burns, during the investigation.
20. This case is different from that considered by EJ McNeill in **Zulu and Gue**, where the claimants were making complaints about a general discriminatory environment in which they had to work, with racist

comments and behaviour from several of their colleagues. In some cases, they could not identify the perpetrators.

21. The alleged wrong of which the claimant complaints, by contrast, is set out in her service complaint form at page 196 onwards. She makes it very clear that she was concerned because her first reporting officer (1RO), Group Captain Yates, had told her that she was ranked 3rd of those Wing Commanders under Air Cdre Burns command, behind two colleagues who had already been boarded for the AST the previous year.
22. She then says that after she commenced her maternity leave on the 16th of November 2022, she had her 2RO (second reporting officer) debrief with Air Commodore Burns. Although Air Commodore Burns made no reference to her peer group comparison ranking during the meeting, she later received a written narrative of their discussion in which she was referred to as “within the top third” of the 14 relevant officers under his command.
23. She then requested clarification of her peer group comparison ranking on the 20th of January 2022 and asked that she be given a numerical value for her position out of 14, as opposed to “the top third”. She was not given these details until much later. After she discovered that she had not been pre boarded or selected for the AST course and was told by a colleague that the colleague was in position #5, she deduced that she was probably in position #4.
24. She received feedback about why she was not selected for the AST on the 11th of May 2023, and it was apparent that the phrase “top third” was a factor - see page 197.
25. The claimant goes on to say that on the 8th of August 2023 she had discussed the issue with Air Commodore Burns and articulated her concerns about the unclear nature of the narrative and the fact that it appeared that her peer group comparison ranking had altered after she commenced maternity leave and in the alternative after the non-statutory investigation (NSI) which she had authored was promulgated and described as “contentious”.
26. On page 197 the claimant said that on the 8th of August 2023, Air Commodore Burns then provided further detail about how he conducted peer group comparison ranking by explaining the metrics he used, but did not tell her how she personally scored against the metrics or where she could have improved, simply saying that she needed to be more competitive against her peers. The claimant recognises that Air Commodore Burns made reassuring comments on that occasion, but she says in her service complaint that the discussion had yet to fully resolve her concerns as she had not been told how she scored against the metrics and her numerical position. She had other concerns about the process, including the fact that she had never previously been advised that she was not competitive for AST during the 2021-2 reporting period. She said that they were time constraints which prevented a full discussion with Air Commodore Burns about her peer group comparison ranking on 8 August 2023.
27. In the section on page 198 in the bundle stating why the treatment was wrong, she said that her peer group comparison ranking

appeared to have been changed following the commencement of her maternity leave and/or the promulgation of the NSI, or in the alternative that she was not properly appraised during the reporting period to enable her to be more competitive in the peer group comparison ranking and during the pre-boarding for AST. She said in the alternative that her appraisal during the reporting period was impacted by pregnancy and or maternity, and or in the further alternative that her role resulted in her undertaking taking protected acts for the purposes of section 27 of the Equality Act 2010 that were considered controversial, and/or that her role reduced her ability to be competitive against her peers during pre-boarding for AST.

28. The outcome or redress the claimant requested was firstly that the peer group comparison be amended to the original position given at the end of the reporting period prior to her maternity leave, placing her in numerical position 3 of 14; secondly that the peer group comparison should be given a numerical value as above; thirdly that the 2RO narrative be amended to clarify that suitability for the AST is not dependent on completion of a command tour, and fourthly assignment to an alternative command position to commence around the end of 2025.
29. On page 200 the claimant specifies that it was Air Commodore Adrian Burns who was the person that she believed had wronged her, and she names Group Captain Yates and Wing Commander Alison McLean as witnesses to her complaint.
30. It can be seen from the above that the substance of the claimant's service complaint was very specifically about the appraisal process and outcome for the 2021 to 2022 reporting period and within that her peer group comparison ranking, and that she believed that Air Commodore Burns had discriminated against her in the course of that appraisal and ranking process for reasons which were discriminatory and broadly related to pregnancy, maternity leave, sex and or detriment as a result of protected acts (victimisation) in authoring the NSI report.
31. Whilst Lieutenant Colonel Drysdale was indicating to the claimant, when she suggested the heads of complaint to which the claimant agreed, that the claimant would be able to elaborate or provide further detail of her complaints against Air Commodore Burns about the appraisal and peer group ranking exercise for the 2021 to 2022 reporting period, she was not, in my judgment, suggesting that the claimant would be able to raise any further matters which were unconnected with the way in which Air Cdre Burns carried out that exercise. That would defeat the object of identifying general heads of complaint.
32. The dispute between the parties about which matters have been raised by way of service complaint must be seen through that prism.
33. **Paragraphs 1(c), 3(d) and 5(d) in the parties' draft list of issues starting at page 74 in the bundle, that being an allegation (now categorised alternately as direct sex discrimination or unfavourable treatment due to pregnancy or exercising the right to maternity leave) about Air Commodore (Air Cdre) Burns**

failing to recommend the claimant for additional comment on her performance by a third reporting officer (3RO), Air Vice Marshall Maria Byford, after receiving a recommendation from Group Captain Yates in December 2022[Note: the parties now agree that 3(d) and 5(g) are effectively the same allegation under section 18 of the EA10 as there is no provision for direct maternity leave]**:** the claimant sets out at paragraph 97 to 99 of her witness statement produced within the service complaint investigation that, following a subject access request, she received disclosure which showed that in October 2022 (the reference to 2023 being an error) Group Captain Yates had suggested that the claimant would benefit from appraisal by a third reporting officer (3RO). The claimant says that there is no record of any discussions about this or why it was not accepted by Air Cdre Burns. She sets out why she thinks that such a report would have improved her chances of being selected for the AST.

34. I consider that these allegations are the kind of details that Lieutenant Colonel Drysdale had in mind when she indicated the further details of the complaint against Air Cdre Burns regarding appraisal/peer group ranking for the 2021-22 reporting period could be provided during the course of the investigation. In my view they are well within the scope of that complaint as they relate to why and how the claimant considered that she had being discriminated against and treated unfairly by Air Cdre Burns.

35. As Employment Judge McNeill stated in **Zulu** and as approved by Mrs Justice Heather Williams, a service complaint must be looked at broadly, in a non-technical manner and taking the complaint as a whole, including what a complainant says about it during the interview process for the service complaint. Adopting the purposive construction that I should, in my view it should have been apparent to the decision maker that part of the reason why the claimant considered the Air Cdre Burns had treated her unfavourably and discriminated against her in respect of the relevant reporting period was that, without any apparent reason, he had ignored the recommendation of her 1RO (Group Captain Yates) that she would benefit from a 3RO [third reporting officer's appraisal].

36. I find, therefore, that the respondent ought to have realised that this allegation was part of the claimant's service complaint of which the Heads of Complaint gave the general description. Sufficient detail was provided by the claimant for the respondent to be able to deal with this allegation within the scope of the service complaint. Lt Col Drysdale was clear that the claimant was alleging that she had been discriminated against on the grounds of pregnancy and or maternity and or sex and or a protected act under section 27 Equality Act by Air Cdre Burns in respect of the relevant appraisal/peer group ranking.

37. I therefore consider that this allegation is included in the "matter" that the claimant has made a service complaint about and that the Employment Tribunal has jurisdiction to deal with it.

38. Likewise, regarding **paragraph 1(e) in that list, Air Cdre Burns , on the 8th of August 2023, said that he could "feel the emotion" when the claimant raised the negative impact on her career of**

the 2021 /2022 OJAR and the ongoing negative effect of the report due to her period of maternity leave. Air Cdre Burns is alleged to have expressed his disappointment and referenced the fact that the claimant was normally logical and very precise, implying that she was not presenting a rational concern: As noted above, this is referred to within the claimant's Record of Interview, at page 258 paragraph 74, when she says that she found it to be "offensive" and that Air Cdre Burns would not have made such a comment to or about a male colleague of the claimant's.

39. Again, I consider that this is a further detail being presented about the reasons why (or in the words of Lieutenant Colonel Drysdale, a further example as to why) the claimant believed that Air Cdre Burns had discriminated against her in respect of the 2021-22 appraisal/peer group ranking. It was therefore part of the "matter" being raised in the service complaint, i.e. why the claimant believed she had been "wronged", and the respondent ought to have realised this and had the opportunity to deal with it within the scope of the service complaint. I therefore find that this is part of the "matter" about which the claimant had made a service complaint, and that the Employment Tribunal has therefore jurisdiction to consider it.

40. **Allegation 3(f) in the list, that the respondent applied criteria in assessing the claimant's performance that resulted in her being treated unfavourably due to pregnancy. (**This is the same factual allegation as paragraph 5(g) and the parties are now agreed that these allegations properly fall under section 18 of the EA10 only, there being no provision for "direct" pregnancy/maternity discrimination)**.** The claimant references the fact that "metrics" were discussed during her discussion with Air Cdre Burns on the 8th of August 2023 in the service complaint itself at p197 but provides further detail in the record of interview at page 257, paragraph 71.

41. Also, at the end of the record of interview, on page 267, para 113, where the claimant summarised why she believed that her peer group comparison ranking was changed and why she was denied a 3rd Reporting Officer (3RO), at sub paragraphs (i) and (iv) she refers to "the metrics" and "the metrics broadly referred to ", firstly in the context of pregnancy/maternity discrimination and (paragraph 113 (iv) as an apparent allegation of indirect sex discrimination – "the metrics broadly referred to, at first sight, would place females at a disadvantage". In the context I find that this is a reference back to the "metrics" she discussed on the 8th of August 2023 with Air Commodore Burns, which are mentioned both in the service complaint form at p197 and at paragraph 71 of the approved ROI.

42. Again, applying a purposive approach and considering the Heads of Complaint that were agreed, I find that it ought to have been clear to the respondent that the claimant was alleging that the metrics referred to by Air Cdre Burns on 8 August 2023 were part of her service complaint and were part of the reason why she believed she had been "wronged" by being discriminated against and victimised in relation to her appraisal and peer group ranking for the relevant reporting period. In those circumstances, I consider the allegation 3(f)

and 5(g) (apart from the references to pregnancy related illness, which I have previously decided was not included in the service complaint of claim) were indeed part of the matter raised in the service complaints process and therefore the tribunal has jurisdiction to deal with them.

43. Next, **the allegation that the respondents subjected the claimant to indirect sex discrimination under paragraph 8 a(ii) of the draft list. I have already determined that the metrics referred to in paragraph 8(a)(ii), in the context of the claim form, can only refer to the criteria/metrics referred to by Air Cdre Burns as alleged in paragraph 60 of the particulars of claim.** Again, there is clear reference to these metrics in the service complaint at p197 and in more detail in the record of interview (as set out above) at pages 257(para. 71) and 267/8 para. 113). As noted by Mrs Justice Williams in **Edwards**, it is not incumbent upon a complainant to distinguish between direct and indirect sex discrimination (under section 19 of the EA 10, it is not possible to bring a complaint of indirect discrimination based on the protected characteristic of pregnancy or maternity) although a service complainant must set out <u>how</u> they have been "wronged".

44. At paragraph 113 (iv) on page 268, it is stated that the metrics broadly referred to (that is the metrics referred to by Air Cdre Burns on the 8th August 2023 - it cannot be a reference to JSP 757, as it is the claimants case that she was not aware that the respondent alleged that JSP 757 had been applied by Air Cdre Burns until the outcome of the service complaint) would place females at a disadvantage.

45. I find that, looking at the service complaint and ROI as a whole and reading them in a non-technical manner, it ought to have been apparent to the decision maker that the claimant was saying that one of the reasons she considered that her peer group comparison ranking and 2021 - 22 appraisal were unfair and discriminatory was because of the metrics that Air Cdre Burns allegedly applied, which, she expressly asserted, would place females (in general) and her in particular at a disadvantage. I find that these were the kind of details that Lt Col. Drysdale was referring to when she proposed the more general Heads of Complaint.

46. The respondent therefore had the opportunity to consider these allegations (that by applying criteria as alleged at page 197 and paragraph 71 of the Record of Interview at page 257, the respondent through Air Cdre Burns was placing both the claimant and women in general at a particular disadvantage in comparison to men) as part of the service complaint. They were part of the "matter" being raised in the service complaint, i.e. how the claimant said she was being "wronged" in respect of her 2021-22 appraisal and peer group ranking by Air Cdre Burns.

47. I conclude that the tribunal has jurisdiction to consider that allegation as an allegation of indirect sex discrimination within section 19 of the Equality Act 2010; it was sufficiently clearly made when the complaint form and ROI are read as a whole.

48. **The allegation that Group Captain Yates said, on the 15th of May 2023, that comparing the claimant and a male colleague was like comparing apples and oranges**; this is now put as an allegation of direct sex discrimination by the claimant. In her service complaint form, she does not complain about Group Captain Yates, indeed she cites him as a witness. In the original version of the record of interview taken by David Field, the person delegated to interview her, the reference to “apples and oranges” is said to be a reference to the respective professions or role within the organisation of the claimant and her male colleague, that is “legal” as opposed to “people” responsibilities. That distinction has been removed from the final version of the ROI, and apparently the investigator agreed to this.
49. Although the alleged comment by GC Yates appears within the final version of the claimant's record of interview, however, it is not expressed as an allegation of direct sex discrimination but rather as an explanation of the claimant’s growing concerns about the process that was applied by Air Cdre Burns when he appraised the claimant and her colleagues and when he carried out the peer group comparison exercise.
50. At paragraph 52 on page 285, the claimant says that she was “surprised” by the justifications Group Captain Yates suggested for Air Cdre Burns position as (Yates) was a senior and experienced People Operations Officer. She continues (at paragraph 53) that she raised her concern that the NSI final report may have impacted her appraisal after the report was more widely promulgated. Group Captain Yates commented that the report was “controversial”.
51. Applying a purposive approach and reading the service complaint as a whole, I do not consider that the claimant presented the information about the “apples and oranges” quote in such a way as to give the respondent a proper opportunity to deal with that as a complaint of direct sex discrimination against Group Captain Yates.
52. In neither the service complaint form nor the ROI did the claimant identify that she was making a complaint about GC Yates, as opposed to identifying him as a witness. The comment was initially phrased not as a comparison between women and men but as a reference to differing responsibilities and disciplines which made comparison difficult. In the final version of her record of interview, the claimant is not overtly accusing Group Captain Yates of making a sexist comment. Indeed, the comment is not obviously sexist, so that the context in which it is said to have been made becomes important. I find that there is nothing said by the claimant in her ROI that would alert the respondent to the fact that she had changed the scope of her complaint to include complaints of direct discrimination against GC Yates. By contrast, she is describing why she started to become concerned that her peer group ranking and her appraisal by Air Cdre Burns had been downgraded and the possible reasons for it.
53. The claimant is very familiar with the service complaints process having been Head of that process for a period, and she must have known that under regulation 8 any new complaints, if raised after the

determination of the admissible complaints would have to be the subject of a fresh complaint.

54. Looking at the matter in the round, I conclude that an allegation of direct sex discrimination against Group Captain Yates because of the comment about apples and oranges was not part of the "matter" raised by the claimant in the service complaint (about her PGC ranking and appraisal by Air Cdre Burns) but is rather "background" information about why she considered Air Cdre Burns to have discriminated against her/victimised her, and therefore the Tribunal has no jurisdiction to deal with this allegation of direct sex discrimination against GC Yates.
55. The claimant's evidence about that comment will be admissible, in my view, in relation to her complaint that her position within the ranking was changed and that her appraisal was downgraded by Air Cdre Burna after she went on maternity leave and after the NSI report was more widely promulgated and that this amounted to discrimination/victimisation. But a complaint of direct sex discrimination against Group Captain Yates is outside of the heads of complaint that the claimant agreed with Lieutenant Colonel Drysdale, and if she had wanted to make a complaint against him as opposed to referring to him as a relevant witness, she should have made a fresh service complaint about that – see regulation 8 of SI 2015/1955, the Armed Forces (Service Complaints) Regulations 2015.
56. **paragraph 1(d) in the draft list, being an allegation of direct sex discrimination in that Group Captain Lewis Cunningham asked the claimant on the 3rd of May 2023 whether she had reached the conclusions she had in the NSI into RAFAT (delivered on 1st of July 2022) because she is female:** as noted above, this allegation, which is now said to be an allegation of direct sex discrimination, is not mentioned at all in the service complaint form. It appears for the first time in paragraph 103 of the record of interview (as amended by the claimant) at page 265-6/ 299 of the bundle.
57. As also noted above, it is part of a section beginning at paragraph 101 on page 265/ 298 which is headed "Negative Impact of the RAFAT NSI". In that section the claimant set out in some detail why she had become concerned and was feeling "vulnerable" about her role in relation to the NSI when it was more widely promulgated. She is describing GC Cunningham's comment to her in that context, that is (as she said) that she believed her report into RAFAT was seen as "contentious" and that GC Cunningham's question was a reflection of this.
58. In my view, looking at the substance of the complaint in the round and in a non-technical manner, and applying the purposive test by asking myself whether the respondent had a reasonable opportunity to deal with a complaint of alleged direct sex discrimination by Group Captain Cunningham, I have to conclude that it has not, and that this specific allegation of direct sex discrimination does not form part of the matter raised in the service complaint.
59. Group Captain Cunningham is not mentioned in the service complaint form at all, far less as someone who has "wronged" the claimant. I

conclude that such an allegation would be outside the scope of the heads of complaint agreed between the claimant and Lieutenant Colonel Drysdale, which were about the PGC ranking and appraisal by Air Cdre Burns, and that if the claimant wanted to pursue a complaint of direct sex discrimination by GC Cunningham, she should have made a fresh service complaint, as mandated by regulation 8 of the 2015 Service Complaint Regulations.

60. It seems to me that the claimant's evidence about what she alleges Group Captain Cunningham said on the 3rd of May 2023 would be admissible evidence in relation to whether or not the claimant was subjected to detriment by Air Cdre Burns because of carrying out protected acts by reason of her involvement in the NSI. Certainly, the allegation of victimisation due to her authoring of the report on RAFAT is accepted by the respondent to be part of the matter complained of in the service complaint, but as I have said, the allegation about GC Cunningham is raised within the overall context that the claimant believes that she has been victimised, rather than that she is making a separate and distinct complaint of direct sex discrimination against Group Captain Cunningham.
61. I noted above that the claimant asked me to take account of comments that she made in a table in response to disclosure that she received during the service complaints process. I asked her to identify if any new complaints which had not been raised in the record of interview were being raised in that table. She did not identify any. Even if she had, it seems to me that the claimant would have to do something more than make comments in response to the respondents disclosure if she wanted to identify to the respondent that she wished to expand her service complaint further by raising new matters not referred to in the record of interview and that in any event, if those matters were outside the scope of the heads of complaint, they should have been the subject of a fresh service complaint under regulation 8.
62. In addition, the claimant wished me to consider submissions that she had made to the Service Complaints Ombudsman as part of her service complaint, so that if she raised the matter with the service complaints ombudsman it should have been treated as being raised as part of the service complaint even if it had not been mentioned at any earlier stage.
63. I cannot accept that this is the true position. Regulation 8 of the 2015 regulations is quite clear that if a new matter is raised by the claimant by way of a complaint after there has been a determination on admissibility, it must be dealt with by way of a fresh service complaint. The decision on admissibility was taken by Lieutenant Colonel Drysdale by agreement with the claimant, effective on the 25th of September 2023. The claimant did not challenge the admissibility decision with the Service Complaints Ombudsman. It follows that if she raised any complaint with the Service Complaints Ombudsman after the decision on admissibility which was not included in her service complaint (either in the form or during the course of the investigation in the investigatory interview or otherwise),

it would have to be raised by way of a fresh service complaint before section 121 would be satisfied.

64. In my view, that finding is consistent with the purpose of section 121, to enable the respondent to deal with any service complaints internally (and promptly) in the first instance before they are brought to an Employment Tribunal. If the claimant could effectively bypass the system, as reflected in regulation 8, by simply raising a matter with the Service Complaints Ombudsman which she has not raised as a separate service complaint, the purpose of section 121 would be negated.

Approved by

Employment Judge Findlay
Date: 30 June 2025

JUDGMENT SENT TO THE PARTIES ON

21 July 2025

FOR THE TRIBUNAL OFFICE